**Teacher suspended for engaging in union activities stated valid First Amendment retaliation claim**

A federal district court in New Jersey has ruled that a teacher, suspended with pay for putting a pro-union essay in the mailboxes of three teachers who crossed a picket line, stated a valid First Amendment claim for retaliation. The court, however, dismissed the teacher’s two other retaliation claims based on qualified immunity.

Robert Cowan, a teacher at Carteret High School (CHS), also served as president of the Carteret Education Association (CEA). At the time he was first elected president of the union, CHS’s administration provided him with a work schedule that included three consecutive non-duty periods during which he could engage in union activities. After the CEA negotiated a new collective bargaining agreement (CBA) with the Borough of Carteret Board of Education (BCBOE) in 2005, Cowan became involved in a union-related incident with board members and an altercation with another teacher. In 2006, the new principal changed Cowan’s schedule, requiring him to teach classes in a subject he had never taught before, but was certified to teach. Although the new schedule included a period for union activity, he no longer had three consecutive non-duty periods. Cowan filed a grievance regarding the schedule, which the principal denied. The teacher altercation was investigated by an assistant superintendent, who noted in her report that Cowan had left his classroom unattended for 10 minutes. After his grievance was denied, Cowan filed suit against BCBOE and a number of CHS and school district officials. He alleged that his schedule change and new subject assignment were adverse employment actions in response to his union activities.

Cowan alleged that shortly after the suit was filed, the superintendent took further retaliatory action against him. Specifically, the superintendent charged Cowan with leaving his class unsupervised during the altercation with the other teacher, and suspended him with pay. The board upheld the suspension, finding there was uncontroverted testimony that Cowan had left his classroom unsupervised for 20 minutes. However, Cowan later submitted the deposition of a CHS assistant principal that corroborated his contention that a substitute teacher was supervising the classroom during the altercation. In the spring of 2008, Cowan organized a “legal job action” that involved teacher picketing before school hours. After three CEA members refused to participate in the picketing, Cowan placed copies of Jack London’s essay, “The Scab,” into their school mailboxes. The essay condemns workers who refuse to honor strikes and other job actions in very strong language. When the superintendent and CHS’s principal questioned Cowan, he denied placing “letters” in the teachers’ mailboxes. Surveillance video, however, showed him putting the essays in the boxes. As a result, Cowan was charged with violating BCBOE policy prohibiting teachers from engaging in union activity in the presence of students while on school property. He received a one week suspension with pay. The defendants filed a motion for summary judgment based on lack of adverse employment action with respect to the schedule change, and qualified immunity on all counts.

The Court began by examining Cowan’s claim that his schedule change constituted an adverse employment action in retaliation for his union activities. It pointed out that Cowan conceded that schedule did not violate the CBA because he still had a free period to conduct CEA business. It also noted that he was certified to teach the new subject he was assigned; while teaching might require addition preparation time, there was no evidence that the assignment prevented him from exercising his First Amendment right to engage in union activities. It emphasized that the defendants, as public officials, were entitled to qualified immunity unless: (1) their conduct violated a constitutional right; and (2) that right was clearly established at the time violation occurred. The district court concluded: “Altering a schedule is clearly within the discretionary functions of the principal, and there is no evidence that a reasonable person in [the principal’s] position would believe that altering a teacher’s schedule and subjects taught would violate a clearly established right held by [Cowan].” It, therefore, found defendants were entitled to qualified immunity on this claim.

The district court again found the defendants were entitled to qualified immunity on Cowan’s claim that his suspension for leaving his classroom unsupervised constituted an adverse employment action in retaliation for his protected union activities. While conceding that the suspension would have amounted to a violation of Cowan’s clearly established constitutional right if the testimony of the assistant principal (corroborating Cowan’s claim that the classroom was supervised) had been provided at the time of Cowan’s suspension hearing, the information available to board at the time of hearing indicated that Cowan had indeed left his classroom unsupervised during the altercation with the other teacher. The district court stressed that Cowan had failed to present any evidence that the superintendent or the board knew that the assistant principal had provided a substitute teacher for Cowan’s class at the time altercation occurred.

The district court found that the defendants were not entitled to qualified immunity on Cowen’s claim of retaliation for distributing “The Scab” essay. It found that the distribution constituted protected speech. It pointed out that there was an ongoing labor dispute and Cowan was alleging the superintendent disciplined him because of his involvement in the union. It stated that it was “reasonable to believe that [the superintendent] and the Board were aware that a suspension for union activity or for distribution of a political essay to fellow colleagues may implicate his First Amendment right of association.” Under the balancing test established in *Pickering v. Bd. of Educ. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968), it was a question of fact for the jury to “determine whether the disciplinary charge was in retaliation for the union work action or whether it was a legitimate charge based on the facts.”

[**Cowan v. Board of Educ. of the Borough of Carteret**](http://www.scribd.com/doc/28101113/Cowan-v-BCBOE), No. 06-5459 (D.N.J. Feb. 22, 2010)

*Editor’s Note: Two other recent court decisions address the use of school-provided facilities for teacher political or union activity. A U.S. district court in New York ruled that the New York City Board of Education’s (NYCBOE) regulation barring teachers from wearing political campaign buttons in school does not violate teachers’ First Amendment free speech rights; but that court did enjoin the NYCBOE from enforcing its regulations prohibiting teachers from using staff bulletin boards and mailboxes to distribute political materials. A summary of the case is at the first link below. The Michigan Court of Appeals, noting that “[e]mails have in essence replaced mailboxes and paper memos in government offices,” decided that emails sent by teachers’ union leaders are not public records under the Michigan Freedom of Information Act. A summary of the Michigan case is at the second link below.*

[**NSBA School Law pages on Weingarten v. Board of Educ. of the City District of the City of New York**](http://www.nsba.org/MainMenu/SchoolLaw/Issues/Employment/RecentCases/Weingarten-v-Board.aspx)  
[**NSBA School Law pages on Howell Educ. Ass’n v. Howell Board of Educ.**](http://www.nsba.org/MainMenu/SchoolLaw/Issues/Employment/RecentCases/Teacher-union-emails.aspx)